Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6739

STEVEN COSTARELLI, Appellant

vs.

COMMONWEALTH OF MASSACHUSETTS, Appellee

ON APPEAL FROM THE MUNICIPAL COURT OF
THE CITY OF BOSTON

JURISDICTIONAL STATEMENT

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No._____

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ON APPEAL FROM THE MUNICIPAL COURT OF
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JURISDICTIONAL STATEMENT

Appellant appeals from his conviction from the Municipal Court of the City of Boston, Massachusetts, entered on February 27, 1974 on a charge of unauthorized use of a motor vehicle, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

No opinion, findings of fact, or conclusions of law were reported by the Municipal Court of the City of Boston.

JURISDICTION

Appellant was convicted on February 27, 1974 in the Municipal Court of Boston and notice of appeal was filed in that court on May 16, 1974. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Sec. 1257(2).

Appellant submits that the Municipal Court of tne City of Boston is a "highest court" of Massachusetts within the meaning of the words in Sec. 1257. From a conviction in a criminal proceeding in a district court of Massachusetts, there is no direct appellate review, but only a trial de novo, or collateral relief, e.g. habeas corpus. Chief Justice Tauro recently summarized this principle in Mann v. Commonwealth, 271 NE 2d 331 (1971) at p. 333:

> "In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the course of the trial in the District Courts. See G.L. C.250 Sec. 9. It is reasonable to conclude that the Legislature intended that, upon appeal, the question of guilt, the sentencing power and all related matters be transferred to the Superior Court for deter-

mination completely divorced from the record of the prior trial.[3] 3. See Duncan v. Louisiana, 391 U.S. 145, ... We need not speculate whether convictions in the District Court resulted from error."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Cohens v. Virginia, 6 Wheat. 264, 375-6; Kentucky v. Powers, 301 U.S. 1, 37-39; Largent v. Texas, 318 U.S. 418, 422; Thompson v. City of Louisville, 362 U.S. 199, 202; Powell v. Texas, 392 U.S. 516, 517.

QUESTIONS PRESENTED

1. Are the States bound by the federal rule of Callan v. Wilson, 127 U.S. 540 guaranteeing defendants a trial by jury in the first instance when charged with an offense carrying a possible jail sentence in excess of six months?

2. Do state two-tier trial de novo procedures which deny a defendant a trial by jury in the first instance for a crime carrying a possible prison term in excess of six months impose an unconstitutional burden on the right to a speedy trial and violate the double jeopardy provisions of the Fifth Amendment?

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution, Massachusetts General Laws Ch. 263 Sec. 4, Ch. 218 Sec. 26, Ch. 278 Sec. 2, 18, and 24, comprise the framework of Massachusetts' two-tier trial de novo criminal procedure and are set forth in the Appendix.

STATEMENT OF THE CASE

A complaint was issued against appellant for the unauthorized use of an automobile, a criminal offense under M.G.L. Ch. 90 Sec. 24(2)(a) carrying a possible two year jail sentence.[1] On February 27, 1974, appellant was tried on this charge in the Municipal Court of Boston. Appellant duly moved the trial court in writing for a trial by jury in the first instance, asserting that this right was guaranteed by the Sixth Amendment pursuant to Callan v. Wilson, 127 U.S. 540 and Duncan v. Louisiana, 381 U.S. 145. The trial court denied this motion. The government placed its case in evidence and rested. The appellant did not testify or present any witnesses or introduce any evidence. At the conclusion, the trial judge found appellant guilty. Appellant brings this appeal to vacate the conviction of the Municipal Court of Boston.

The federal questions underlying this appeal were raised by appellant at his trial in the Municipal Court of the City of Boston by his motion for a trial by jury. In this motion, he expressly claimed his right to a speedy trial by jury under the Sixth Amendment citing Callan v. Wilson, supra, Duncan v. Louisiana, supra, Klopfer v. North Carolina, 386 U.S. 213, and Holliday v. State, 280 A. 2d 333, and his rights under the double jeopardy clause of the Fifth Amendment citing Benton v. Maryland, 89 S. Ct. 2056, and United States v. Jorn, 400 U.S. 470.

The entire record of the "non-record" Municipal Court of Boston comprises the complaint setting out the charge; appellant's written mo-

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[1]The relevant part of M.G.L. Ch. 90 Sec. 24(2)(a) is set out in the Appendix, p. 11.

for a speedy jury trial in which he specifically claimed his constitutional rights; the trial judge's written denial on the motion; and his written guilty finding noted on the complaint. A copy of the entire record is set forth in Appendix pp. 11-15.

THE QUESTIONS ARE SUBSTANTIAL

1. Massachusetts criminal procedure comprises a two-tier trial de novo system. Defendants, for the most part,[2] are charged initially upon a complaint in the non-record district court where they cannot obtain a trial by jury. Upon a conviction in the district court, a defendant cannot obtain any direct appellate review,[3] but has an automatic right to "appeal" his conviction for a trial de novo in the Superior Court where he may obtain a trial by jury.[4] If the defendant fails to prosecute his "appeal", the superior court may default him and impose sentence for the crime he was convicted of in the district court by a magistrate.[5]

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[2] The district courts in Massachusetts have jurisdiction over all crimes having an authorized punishment up to five year imprisonment. See M.G.L. Ch. 218 Sec. 26 set out in the Appendix p. 10.

[3] Extraordinary writs and collateral relief invoking the Supreme Judicial Court's supervisory powers are available.

[4] See M.G.L. Ch. 278 Secs. 2 and 18 set out in the Appendix p. 10.

[5] See M.G.L. Ch. 278 Sec. 24 set out in the Appendix p. 10.

The Supreme Judicial Court of Massachusetts held in Jones v. Robbins, 8 Gray 329, 341 that Massachusetts' two-tier trial de novo system does not violate Article XII of the Declaration of Rights of the Massachusetts Constitution[6] guaranteeing that no law "shall subject any person to ... infamous punishment ...without trial by jury" which words Chief Justice Shaw stated were "equivalent" to the clause — "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" — in the Sixth Amendment.

In Callan v. Wilson, 127 U.S. 540, Justice Harlan took note of Jones v. Robbins at page 553-4 and rejected its reasoning at page 556-7 by holding that the Sixth Amendment guarantee to a trial by jury meant trial by jury in the first instance: "Except in that class or grade of offenses called petty offenses, ...the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged."

Duncan v. Louisiana, 391 U.S. 145, 149 bound the states to the Sixth Amendment and by dicta, the rule of Callan v. Wilson, supra. See Duncan at page 148 ftn. 30, 181, 182 ftn. 21, 213. The Rhode Island Supreme Court in Holliday v. State, 109 R.I. 93 (1971) has held unanimously that Duncan has bound the states to the rule of Callan v. Wilson. The Supreme Court of Virginia has held the contrary in Manns v. Commonwealth, 213 Va. 322. The issue is undecided among the two-tier trial de novo systems of other states.

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[6]Article XII of the Declaration of Rights of the Massachusetts Constitution is set out in the Appendix p. 9.

See ftn. 9 and 10 in Colten v. Kentucky, 32 LEd. 2d 584, 592 (1972) citing Massachusetts, North Carolina, Pennsylvania. Cf. Lemieux v. Robbins, 414 F2d 353, 355 ftn. 3 (1969) noting the two-tier procedure in Maine. See also: D. Non-Jury Trial for Misdemeanors Subject to De Novo Review, Appendix to opinion of Justice Harlan, Williams v. Florida, 399 U.S. 78, 141.

2. The companion issue presented by this appeal is whether the imposition of a trial without jury is an unconstitutional burden on the defendant's right to a speedy trial by jury which he was unquestionably entitled to under the Sixth Amendment. The two-tier trial de novo procedure is totally counter-productive to minimizing the "anxiety and concern of the accused", Barker v. Wingo, 33 LEd 2nd 101, one of the main purposes of the speedy trial guarantee. For the defendant who chooses not to disclose his defense, a trial in the district court is a meaningless proceeding. A conviction and "appeal" from a district court trial generates a "cloud of anxiety, suspicion and often hostility", Barker v. Wingo, supra, and United States v. Marion, 404 U.S. 307, 321, and shifts the burden on the defendant to prosecute his "appeal" to prove his innocence, M.G.L. Ch. 278 Sec. 24. See Holliday v. State, supra, alternatively holding that two-tier trial de novo procedures violate the speedy trial provisions of the Sixth Amendment.

Similarly, the two-tier trial de novo system inherently violates the underpinnings of the double jeopardy provisions of the Fifth Amendment – "/T/he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alledged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though

innocent he may be found guilty", United States v. Green, 355 U.S. 184, 187-188.

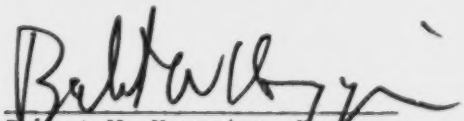
Implicit in limiting "the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws", United States v. Jorn, 400 U.S. 470, is limiting it to a single proceeding which comports with constitutional standards, and it is no answer on the part of States to eventually offer the defendant a constitutional de novo adjudication, Ward v. Village of Monroeville, 34 LEd 2nd 269, 272 (1972).

Since the above issues effect the administration of criminal justice in at least ten states, and since there is a conflict between the decisions of the highest court of at least two of these states, it is submitted that the questions presented by this appeal are substantial and of public importance.

CONCLUSION

Appellant maintains that the Municipal Court of the City of Boston erred in denying him a trial by jury. He believes that such a denial violated his Sixth Amendment right to a trial by jury and to a speedy trial. It is submitted that the questions presented by this appeal are so substantial to require plenary consideration for their resolution.

Respectfully submitted,



Robert W. Hagopian, Esq.
Counsel for Appellant

APPENDIX

Article XII of the Massachusetts Declaration of Rights:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgement of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

The relevant portion of M.G.L. Ch. 218 Sec. 26 reads:

> District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective districts or otherwise made punishable therein; all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in ... .

The relevant portion of M.G.L. Ch. 278 Sec. 18 reads:

> Whoever is convicted of a crime before a district court may appeal to the superior court, and at the time of conviction shall be notified of his right to take such appeal.

M.G.L. Ch. 278 Sec. 2 reads:

> Issues of fact joined upon an indictment or complaint shall, in the superior court be tried by a jury drawn and returned in the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

M.G.L. Ch 278 Sec. 24 reads:

> If the appellant fails to enter and prosecute his appeal he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and if he is not them in custo-

dy, may issue process to bring him into court to receive sentence.

The relevant portion of M.G.L. Ch. 90 Sec. 24(2)(a) reads:

Whoever ..... and whomever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, ...

TO THE JUSTICES OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, holden at said City of Boston for the transaction of criminal business, within the County of Suffolk,

Richard Tracy

of the City of Boston, in the County of Suffolk, in behalf of the COMMONWEALTH OF MASSACHUSETTS, on oath complains that

Steven Costarelli

of said City of Boston, on the twenty seventh day of November in the year of our Lord one thousand nine hundred and seventy three at the City of Boston aforesaid, and within the judicial district of said Court, upon a certain public way there situate called Albany street, (Emergency Parking Lot of the Boston City Hospital) did then and there use a certain motor-vehicle, to wit, an automobile the property of

Leroy Taylor

, the said Costarelli then and there well knowing such use of said automobile by him said Costarelli to be unauthorized

v. Jorn, 400 U.S. 470.

By his attorney.

SUFFOLK, ss

BOSTON MUNICIPAL COURT

CRIMINAL #_____

unauthorized use rh. 90 sec 24 trial date Feb. 6, 1974

COMMONWEALTH OF MASSACHUSETTS

vs.

STEPHEN ~~COSTENELLO~~ Costarelli RWH

MOTION FOR JURY TRIAL

Now comes the defendant and moves this court for a trial by jury in the first instance, a right guaranteed by the Sixth Amendment to the Constitution, Callan v. Wilson, 117 U.S. 540, Duncan v. Louisiana, 391 U.S. 145, ftn. 30; and a right guaranteed by the speedy trial provision of the Sixth Amendment, Klopfer v. North Carolina, ___ U.S. _____, Holliday v. State, 280 A.2d 333; and a right guaranteed under the double jeopardy provisions of the Fifth Amendment, Benton v. Maryland, 89S. Ct. 2056, U.S.

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COMMONWEALTH

ON COMPLAINT OF
Richard Tracy

vs.
Steven Costarelli

UNAUTHORIZED USE OF AUTOMOBILE

Gen. Laws Chap. 90 Sec. 24
30 days
$50-$500 or 2-Months-2 years or both
JAN 23 1974

FILED IN COURT
100 to Feb-6. Exty
Eldridge
FEB 6 1974
, motion for jury trial and
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FILED IN COURT
FEB 14 1974
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ON Feb. 27
Sandro FEB 14 1974 Nolan Lyons
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FEB 27 1974

FOUND GUILTY

HOUSE OF CORRECTION Mes. N. R. A.

APPEAL 5 yrs SUP. CT.

1st MONDAY OF March

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FOLK, ss

MUNICIPAL COURT OF
THE CITY OF BOSTON
CRIMINAL 4 3

COMMONWEALTH OF MASSACHUSETTS

vs.

STEVEN COSTARELLI

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Steven Costarelli, the
ellant above named hereby appeals to the Supreme
rt of the United States from the conviction of the
icipal Court of the City of Boston on February 27,
4. This appeal is taken pursuant to 28 U.S.C. Sec.
7(2).

By his attorney,

Robert W. Hagopian, Esq.
Wrentham, Mass. 02093

CERTIFICATE OF SERVICE

Now comes Robert W. Hagopian, Esq., and certifies
t he has served a copy of the above Notice of Appeal
Arthur Murphy, Boston Police Prosecutor, by mailing a
y of same first class, postage prepaid, Boston Police